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Monday, October 18, 2010

Interview with Jordan Hatcher

Over the past twenty years or so we have seen a rising tide of alternative copyright licences emerge — for software, music and most types of content. These include the Berkeley Software Distribution (BSD) licence, the General Public Licence (GPL), and the range of licences devised by Creative Commons (CC). More recently a number of open licences and "dedications" have also been developed to assist people make data more freely available.

The various new licences have given rise to terms like "copyleft" and "libre" licensing, and to a growing social and political movement whose ultimate end-point remains to be established.

Why have these licences been developed? How do they differ from traditional copyright licences? And can we expect them to help or hinder reform of the traditional copyright system — which many now believe has got out of control? I discussed these and other questions in a recent email interview with Jordan Hatcher.

A UK-based Texas lawyer specialising in IT and intellectual property law, Jordan Hatcher is co-founder of OpenDataCommons.org, a board member of the Open Knowledge Foundation (OKF), and blogs under the name opencontentlawyer.

Jordan Hatcher

Big question

RP: Can you begin by saying something about yourself and your experience in the IP/copyright field?

JH: I'm a Texas lawyer living in the UK and focusing on IP and IT law. I concentrate on practical solutions and legal issues centred on the intersection of law and technology. While I like the entire field of IP, international IP and copyright are my most favourite areas.

As to more formal qualifications, I have a BA in Radio/TV/Film, a JD in Law, and an LLM in Innovation, Technology and the Law. I've been on the team that helped bring Creative Commons licences to Scotland and have led, or been a team member on, a number of studies looking at open content licences and their use within universities and the cultural heritage sector.

I was formerly a researcher at the University of Edinburgh in IP/IT, and for the past 2.5 years have been providing IP strategy and IP due diligence services with a leading IP strategy consultancy in London.

I'm also the co-founder and principal legal drafter behind Open Data Commons, a project to provide legal tools for open data, and the Chair of the Advisory Council for the Open Definition. I sit on the board for the Open Knowledge Foundation.

More detail than you can ask for is available on my web site here, and on my LinkedIn page here.

RP: It might also help if you reminded us what role copyright is supposed to play in society, how that role has changed over time (assuming that you feel it has) and whether you think it plays the role that society assigned to it successfully today.

JH: Wow that's a big question and one that has changed quite a bit since the origin of copyright. As with most law, I take a utilitarian / legal realist view that the law is there to encourage a set of behaviours.

Copyright law is often described as being created to encourage more production and dissemination of works, and like any law, its imperfect in its execution.

I think what's most interesting about copyright history is the technology side (without trying to sound like a technological determinist!). As new and potentially disruptive

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technologies have come along and changed the balance — from the printing press all the way to digital technology — the way we have reacted has been fairly consistent: some try to hang on to the old model as others eagerly adopt the new model.

For those interested in learning more about copyright's history, I highly recommend the work of Ronan Deazley, and suggest people look at the first sections in *Patry on Copyright*. They could also usefully read Patry's *Moral Panics and the Copyright Wars*. Additionally, there are many historical materials on copyright available at the homepage for a specific research project on the topic here.

Three tranches

RP: In the past twenty years or so we have seen a number of alternative approaches to licensing content develop — most notably through the General Public Licence and the set of licences developed by the Creative Commons. Why do you think these licences have emerged, and what are the implications of their emergence in your view?

JH: I see free and open licence development as happening within three tranches, all related to a specific area of use.

1. FOSS for software. Alongside the GPL, there have been a number of licences developed since the birth of the movement (and continuing to today), all aimed at software. These licences work best for software and tend to fall over when applied to other areas.

2. Open licences and Public licences for content. These are aimed at content, such as video, images, music, and so on. Creative Commons is certainly the most popular, but definitely not the first. The birth of CC does however represent a watershed moment in thinking about open licensing for content.

I distinguish open licences from public licences here, mostly because Creative Commons is so popular. Open has so many meanings to people (as do "free") that it is critical to define from a legal perspective what is meant when one says "open". The Open Knowledge Definition does this, and states that "open" means users have the right to use, reuse, and redistribute the content with very few restrictions — only attribution and share-alike are allowed restrictions, and commercial use must specifically be allowed.

The Open Definition means that only two out of the main six CC licences are open content licences — CC-BY and CC-BY-SA. The other four involve the No Derivatives (ND) restriction (thus prohibiting reuse) or have Non Commercial (NC) restrictions. The other four are what I refer to as "public licences"; in other words they are licences provided for use by the general public.

Of course CC's public domain tools, such as CC0, all meet the Open Definition as well because they have no restrictions on use, reuse, and redistribution.

I wrote about this in a bit more detail recently on my blog.

3. Open Data Licences. Databases are different from content and software — they are a little like both in what users want to do with them and how licensors want to protect them, but are different from software and content in both the legal rights that apply and how database creators want to use open data licences.

As a result, there's a need for specific open data licences, which is why we founded Open Data Commons. Today we have three tools available. It's a new area of open licensing and we're all still trying to work out all the questions and implications.

Open data

RP: As you say, data needs to be treated differently from other types of content, and for this reason a number of specific licences have been developed — including the Public Domain Dedication Licence (PDDL), the Public Doman Dedication Certificate (PDDC) and Creative Commons Zero. Can you explain how these licences approach the issue of licensing data in an open way?

JH: The three you've mentioned are all aimed at placing work into the public domain. The public domain has a very specific meaning in a legal context: It means that there are no copyright or other IP rights over the work. This is the most open/free approach as the aim is to eliminate any restrictions from an IP perspective.

There are some rights that can be hard to eliminate, and so of course patents may still be an issue depending on the context, (but perhaps that's conversation for another time).

In addition to these tools, we've created two additional specific tools for openly licensing databases — the ODbL and the ODC-Attribution licences.

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RP: Can you say something about these tools, and what they bring to the party?

JH: All three are tools to help increase the public domain and make it more known and accessible.

There's some really exciting stuff going on with the public domain right now, including with PD calculators — tools to automatically determine whether a work is in the public domain. The great thing about work in the public domain is that it is completely legally interoperable, as it eliminates copyright restrictions.

RP: Are there now open, free or public licences for every type of content?

JH: There's at least something out there for everything that I know of, though there are edge cases in openly licensing trademarks or in some patent communities. Who knows though what we'll be talking about in 10 years?!

RP: You said that non-commercial restrictions do not conform to the Open Knowledge Definition of open. In fact, many people argue that NC makes no sense at all, not least because it is practically impossible to define what non-commercial means. What are your thoughts on this?

JH: The arguments against Non Commercial restrictions tend to centre on the fact that it breaks compatibility with other, open, licences (as "open" means allowing commercial use). While NC restrictions aren't open, that doesn't mean that they aren't useful. Many successful publishers and authors in fact incorporate NC restrictions as part of their online strategy.

Creative Commons did a study to try to understand more about what people mean with NC, and found that many licensors and licensees generally agree on the broad activities covered by the non-commercial restriction. While there are challenges with defining some of the edge cases around non-commercial use, there's a definite norm built into using it as a licensing term.

Distributed production

RP: How important do you think the rise of digital media and the Internet have been in the emergence of free and open licensing (and the free and open source software movements that have accompanied them)?

JH: Digital technology and the internet have been absolutely critical in the emergence and role of free and open licensing. Free and open licensing is a tool to harness and encourage distributed production — lots of people working at different times and in different places. That's the great thing about open source — giving access to the human readable code allows the "many eyes" method of production that Eric S. Raymond talks about.

One of my favourite examples of the power of distributed production (though not open licensing) is anime fansubs. An anime show can go on the air in Japan and in less than 24 hours be translated into English, subtitles inserted, format shifted, and then distributed out on the web via a worldwide network of unpaid people. Now of course whether that activity is legal is a whole different question, which I've written about a bit here.

RP: Most people seem to think that open and free licences provide a new type of copyright. That is not strictly accurate is it? Do they not rather simply separate out all the different rights that come with copyright today, and allow rights owners to assert those rights they wish to assert, and waive the others — and in a standardised way?

JH: You're right — open licensing is not a new type of copyright — it's the exact same copyright bundle of rights that the RIAA or the MPAA uses to enforce their rights. Open licensing just structures the relationship differently by giving broad permissions up front for the work with few restrictions, while the typical licensing approach is often to have broad restrictions and limited permissions.

Using public licences helps standardise and form a community around the various open licences, which ups their adoption and lowers the barrier of using openly licensed material by making it easier to figure out your obligations once (by understanding a single licence) across a broad range of works.

One has to be careful when using the term "waiver" however — waiver means giving up your rights, i.e. you no longer have the right. A licence means that you still have the right, but give permission for certain types of use.

Open licences don't normally waive other rights — they licence them. By contrast, public domain dedications (PDDL or CC0 for example) are primarily waivers — because they try to help people totally give up their rights in copyright (and database rights).

Licence proliferation

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Followers

RP: We mentioned the GPL and the CC licences, but there are also open source licences like the BSD, the Artistic Licence, the Apache Licence, the Mozilla Public Licence, and the Microsoft Public and Microsoft Reciprocal Licences? Some argue that there are now simply too many alternative licences. What are the issues associated with licence proliferation and what is the solution (is there one)?

JH: The main issue with licence proliferation is one of interoperability. Some open licences aren't legally interoperable with others, and so what can happen is that various licence silos can be created.

There's not an easy solution to this, though using a licence that plays well with lots of others (such as the BSD family of licences, CC-BY, ODC-Attribution, and of course public domain tools) can help ensure lots of interoperability.

RP: How can people find their way through the jungle of alternative licences now available? How can they know what licence is appropriate for them?

JH: There are lots of resources available online for people to find out about the various free and open licences available out there. When considering a licence for something new, the best place to start is not with a licence but with asking yourself, or asking the business: What is the goal you are trying to accomplish?

Building from those answers and the type of material (data, software, content) you can then pick the open licence that most fits those goals.

RP: If one was trying to sketch out a rough guide explaining the key characteristics of the different types of alternative licences how would you go about it — for instance, people use terms like free, open, gratis vs. libre; and they talk about "share alike"? Is this not overly confusing?

JH: I see very little difference from a legal perspective when people talk about free vs. open vs. libre. They all use copyright to accomplish broadly the same goals (attribution, copyleft/share alike) and so it's more a social/political aspect rather than a straight legal distinction. The incorporation of libre into the debate of course produces a great acronym to discuss it all — FLOSS licensing!

RP: The GPL is often referred to as being "viral". What does that mean in practice?

JH: "Viral" is such a poor word to describe it, as it implies that like a real virus you have no choice about being "infected" with it. "Viral" is used to describe what's been variously described as copyleft; share alike; or reciprocal licensing.

It's a pretty simple concept really — if you build on someone else's work you have to use the same licence they used for their stuff for your contributions. It's kind of like the golden rule, but for software licensing.

RP: So people opt to embrace copyleft; it is not something foisted on them involuntarily?

JH: Right. And it is voluntary because there is nothing that forces you to use the work of other people — it's a choice. Just like if I choose to use software from a proprietary software vendor they will typically have all sorts of restrictions on what I can and can't do with the code; and if I don't like it I can use an alternative, or not use it at all.

I think the key problem for people who describe copyleft as "viral" is simply one of control — compared with other IT contracting they (often) don't have the option to negotiate different terms to the licence and so see it as forcing them to do something that they'd prefer not to do.

Social and political issues

RP: As you said, there are also social and political issues at work here. As a result, there have been a number of ideological disputes about the new-style licences. Free software advocates, for instance, have criticised some of the Creative Commons licences, and indeed some have criticised the entire political logic of CC. Can you explain the background to this, and whether the issue has been settled?

JH: I don't want to put words into anyone's mouth, and trying to sum up the number of disputes out there quickly wouldn't do them justice. Like anything, CC has its flaws and its benefits, and in any free (as in libre) society — and especially as part of an overall open movement — these should be discussed.

RP: Some argue that the problem with Creative Commons is that it seeks to work around the copyright system rather than reform it, and so could end up bolstering an IP system that many feel has got out of control. Is this a valid criticism? Could it perhaps also be said of free software licences like the GPL?

JH: To some CC is an escape valve letting off just enough steam to prevent the copyright boiler from exploding, when they would rather the whole thing exploded, and so make it necessary to rewrite copyright law.

In this view, CC prevents some critical legal reform by giving solutions to people who otherwise would be doing all the things necessary to get legislators moving faster. It's certainly a valid criticism but I think it's safe to say they've lost that fight. We have CC licences; they've been ported worldwide; and so they are in use globally in a wide variety of contexts.

I think that CC might actually work in the opposite direction of this argument — by making copyright law more accessible to people, and so helping them understanding the sometimes negative impact that copyright can have on their daily lives, maybe more people will become politically active in this area. Who knows? It could be an interesting research topic, and either way I'm sure we'll find out in the next couple of years who was right.

RP: I wonder if perhaps one of the biggest problems posed by the copyright system today is the so-called** orphan works **phenomenon — which flows from the fact that in most, if not all, jurisdictions copyright now comes into effect the moment a work is created or expressed. Is this a serious problem? If so, what is the solution?

JH: I see the main cause of the orphan works problem to be that automatic copyright (the default baked into international treaties) lasts so long, not so much that it is automatic in the first place. Many jurisdictions have terms of life + 70 years, and the real orphan works problem starts way down the line when no one remembers, or has any records of, who the actual author or rights holder is. So while we may know roughly when a work was created, and so whether or not it is in copyright, we just don't know who holds the rights.

Orphan works are a serious problem mainly because they represent such an unknown risk: If you don't know who the rights holder is there is no chance of acquiring a licence (because the rights holder is unknown). Moreover, the seemingly ever increasing penalties for copyright infringement constantly raise the stakes. This poses a really serious risk for cultural heritage institutions — our collective memory — who have lots of interesting material that they're not sure what to do with due to it having this unknown copyright status.

As to a solution, there are many options being discussed, from more radical suggestions like having a very short copyright term, to proposals that would work within the current framework such as compulsory licensing. Who knows where we'll end up, but I think it's becoming clearer to legislators throughout the world that something must be done.

Still very much up for debate

RP: One problem that surely won't go away any time soon for individuals creating copyrighted works is that if someone infringes their copyright there is little they can do about it unless they have access to a lot of money — because access to the law is usually very expensive. Would you agree?

JH: I don't think I'd agree with that at all. Of course a lot depends on the specific facts and jurisdiction. But just sending an email to people and asking for them to comply can often get results, which is free! And in many jurisdictions, legal counsel may take a copyright case on contingency if it needs to proceed further.

Access to justice is an issue across many areas in the law of course, and not an issue exclusive to copyright law.

RP: Critics argue that that some courts may not recognise licences like the GPL and the CC licences. There have now been a number of cases involving these licences. What do we learn from these so far as enforceability is concerned?

JH: While there are a few cases now, I think the focus for enforcement of FOSS licences is and always has been on the community of practice built up around the licences by both the FOSS community and business users.

Eben Moglen and Richard Stallman often describe the GPL as the constitution of the free software movement. I think that's a very apt description, as like a constitution and a society, there's lots of enforcement through social norms and norms of interpretation.

The same is true for the CC licences — just by having such a large community of users, including businesses, help enforcement. Simply naming and shaming people that don't meet these norms gets lots of people to come into compliance.

RP: You said earlier that when technology changes some people try to hold on to the old model, and others embrace the new model. Since IP law has become deeply embroiled in the often-heated discussions about appropriate models,

and since — like any law — it determines what people can and cannot do, and so what models are possible, some believe that it has become part of a much larger struggle between open and closed models. If that is right, then presumably one of those models will eventually win. Do you agree? If so, how will the struggle end? And what model do you think will win?

JH: I don't see open and closed models as a (huge) battle that one side will win or lose. Open licensing is a legal tool that is also associated to various degrees with various social and political movements. Open licensing models, and approaches like, open innovation, are one option out of many approaches, and I think it will stay that way for a long time.

Copyright law will likely change, and technology will change and impact the need and rationale both for copyright law specifically and many other areas of law generally. In the end, however, I fundamentally believe in a role for copyright and IP law in society. What that role is and how it's played is still very much up for debate.

Posted by Richard Poynder at 13:41 

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